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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-718

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROBERT M. SCHUCKER,
PETITIONER,

vs.

TERRY G. ROCKWOOD; JAMES C. FUKUHARA; DEWAR, ROMIG & ROCKWOOD, INC.; ANNE D. McGOWAN; DeLAY, LAREDO & McGOWAN; MAURICE JOURDANE,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT MAURICE JOURDANE

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MAURICE JOURDANE

COPY

QUESTIONS FOR REVIEW

1. Did the United States Court of Appeals for the Ninth Circuit render a decision in conflict with an applicable decision of this court, specifically Stump v. Sparkman (1978) 453 U.S. 349, 98 S.Ct 1099, 55 L.Ed.2d 331, or its antecedents or progeny?

2. Did the United States Court of Appeals for the Ninth Circuit render a decision in conflict with an applicable decision of this Court, specifically Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d. 349, and its progeny?

PARTIES: The names of all parties to the proceeding in the United States Court of Appeal for the Ninth Circuit are contained in the caption of the case in this Court.

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In sequential order by dates:

1. Order and Judgment of the U.S. District Court for the Northern District of California, filed June 10, 1986, and entered July 1, 1986, in Schucker v. Rockwood, et al., case number C-86-20009 WAI.

2. Opinion of the U.S. Court of Appeals for the Ninth Circuit, filed May 17, 1988, and amended June 29, 1988, in Schucker v. Rockwood, et al., appeal docket number 86-2900.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is statutorily conferred by 28 U.S.C. §1254(1) with Supreme Court rule 17.1 being applicable for grounds.

Petitioner herein apparently sent his Petition for Writ of Certiorari on or about September 18, 1988, (two and a half months after the filing of the amended Opinion of the Ninth Circuit) alleging on page 6 that he is relying on Supreme Court Rule 17.1(c) for grounds. Assuming compliance with all other docketing rules and requirements, the petiion appears to be timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"...(N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

— The Constitution of the United States of America, Amendment XIV, Section 1

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

—Title 42, U.S. Code §1983

"Except as provided in Sections 917.1 through 917.9 and in Section 117.ha[1], the perfecting of an appeal stays proceeding in the trial court upon the judgment appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

—California Code of Civil Procedure §916(a)[2]

—[hereinafter referred to as CCP §916(a)]

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[1] These exceptions are contained in the Appendix to this petition. None of the exceptions are relevant to the issues herein.

[2] In effect at all times relevant, through June 30, 1983. Effective July 1, 1983, section 117ha was renumbered to read Section 117.7.

"The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for money or directs the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action, unless an undertaking is given."

—California Code of Civil Procedure §917.1(a)
[hereinafter referred to as CCP §917.1(a)]

"The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

—Supreme Court Rule 21.5

"(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and the usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

"(b) When a state court of a federal court of appeals has decided an important question or federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

—Supreme Court Rule 17.1(a) and (c)

"Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleading need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee."

—Federal Rule of Civil Procedure 11

STATEMENT OF THE CASE

On July 1, 1977, the Superior Court of California, County of Monterey, entered final judgment in the domestic case, number MDR 7022, entitled Hildegarde Schucker, petitioner, vs. Robert M. Schucker, respondent, based upon and incorporating an April 29, 1976, interlocutory judgment. The judgment awarded to Hildegarde Schucker 28.5% of Robert M. Schucker's military retirement pay in addition to custody of three minor children after a 15 year marriage. Based thereon, no spousal support was awarded.

On June 16, 1981, the U.S. Supreme Court decided McCarty v. McCarty (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589. Petitioner herein immediately ceased complying with the then four (4) year old Monterey County Superior Court final order, upon which the time to appeal had long since run.

On August 12, 1981, petitioner herein appeared on an Order to Show Cause why he should not be found in contempt. The matter was heard and ruled upon by the Honorable Harkjoon Paik, Judge of the Monterey County Superior Court. Judge Paik declined to hold petitioner Robert M. Schucker in contempt. Subsequently, petitioner herein appeared on a motion by his former wife entitled "Motion for Distribution of Community Property." That matter was heard and ruled upon by the Honorable Ralph M. Drummond, Judge of the Monterey County Superior Court, on November 27, 1981, who simply denied the motion. **HOWEVER, NEITHER JUDGE OVERRULED OR SET ASIDE THE PRIOR FINAL ORDER OF SAID COURT MADE ON JULY 1, 1977, AND UPON WHICH THE 60 DAY APPELLATE TIME HAD ALREADY EXPIRED.**

On January 6, 1982, a Notice of Appeal as to the Monterey County Superior Court ruling of November 27, 1981, was filed by counsel for Hildegarde Schucker.

On May 6, 1983, another Order to Show Cause hearing was held before the Honorable MAURICE JOURDANE, then Judge of the Monterey County Superior Court. Petitioner herein made an appearance, specifically to raise THE IDENTICAL JURISDICTION ISSUE that he raises here. Briefs from both sides were requested and submitted on May 20, 1983. By written decision, Judge JOURDANE found Robert M. Schucker in contempt and stayed sentencing to allow him to obtain a ruling on the appeal. As to arrearages, Judge JOURDANE allowed a stay only if petitioner Schucker posted an undertaking for the amount of the arrearages owed.

Petitioner herein on June 10, 1983, then filed with the Appellate Court of the State of California for a writ of prohibition, requesting that the Appellate Court prohibit the trial court from exercising jurisdiction. That petition for writ was denied on June 22, 1983.

Subsequently, petitioner herein on July 27, 1983, filed a motion in Monterey County Superior Court to set aside the interlocutory and final judgments of dissolution, then seven (7) years and six (6) years old respectively, in another attempt to accomplish his stated purpose of avoiding his legally imposed duty of payment. When that motion was denied on August 26, 1983, Robert M. Schucker appealed to the California Court of Appeals, where it was consolidated with the already pending appeal. Oral argument was heard on March 6, 1984, and a written decision was handed down on May 23, 1984. The decision

upheld the prior ruling of Judge JOURDANE and overturned the ruling of November 27, 1981, by Judge Drummond.

On September 21, 1984, petitioner herein was finally sentenced by the Monterey County Superior Court for his July 29, 1983, contempt conviction. Petitioner was again afforded opportunity to purge himself of the contempt by payment of arrearages, then totaling $13,278.88. His response was to state he would be filing bankruptcy. The Superior Court ordered 90 days in County jail and offered suspension of all 90 days conditioned upon (1) payment of child support, (2) delivery of the 28.5% of military retirement pay, and (3) additional payments of $1,000.00 per month until the arrearage was paid. Robert M. Schucker was advised that if no payment was made, a bench warrant would issue for his arrest. Mr. Schucker's reply was to simply send a letter to the court stating, "I regret that I cannot comply with the terms of the Minute Order you issued on September 21, 1984, in the above cited case." On December 28, 1984, punishment for contempt was modified to require Mr. Schucker to actually serve 5 days in the County Jail again after he brought up the IDENTICAL JURISDICTIONAL ISSUE.

On December 24, 1985, Robert M. Schucker filed his complaint in the U.S. District Court, alleging a civil rights violation pursuant to 42 U.S.C. §1983 based upon the IDENTICAL JURISDICTIONAL ARGUMENT that had been rejected by the California Superior Court and the California Court of Appeal. The only additional allegation in his District Court complaint was that the above facts amounted to the California Superior Court having proceeded in the clear absence of subject matter jurisdiction during the period of time that his former wife's appeal was pending.

The District Court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) by its Order entered July 1, 1986, finding that Judge JOURDANE had not acted in the clear absence of jurisdiction under the facts pled. Petitioner's subsequent motion to alter or amend judgment was denied on October 23, 1986.

Petitioner herein then appealed to the United States Court of Appeals for the Ninth Circuit, which court affirmed the Disrict Court by its Opinion filed May 17, 1988, and amended June 29, 1988. The Ninth Circuit Court also found that Judge JOURDANE had not proeeded in the clear absence of jurisdiction.

SUMMARY OF ARGUMENT

Petitioner has intentionally misstated the Questions for Review by this Court in violation of Supreme Court Rule 21.5 by alleging a conflict between the U.S. Court of Appeals Opinion below and decisions of the Supreme Court so that he can allege Supreme Court Rule 17.1(c) as a ground for review.

Such is clearly not true and, in fact, the U.S. Court of Appeals completely adhered to all applicable law.

Petitioner is simply hoping for a review de novo of his position that has now been unsuccessful in (1) the Superior Court of the State of California, (2) the California Court of Appeal, (3) the U.S. District Court, Northern California District, and (4) the United States Court of Appeals for the Ninth Circuit.

Petitioner fails to properly advise this Court of sufficient background with any accuracy and clearness, essential to a ready and adequate understanding of the points requiring consideration.

Petitioner's actions at this time show an intended violation of Federal Rule of Civil Procedure 11 so as to invoke the authorizing of this Court to impose sanctions, attorney's fees and costs against him.

ARGUMENT

As stated in Supreme Court Rule 17.1, "(A) review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor...." Supreme Court Rule 21.5 states:

> ".5 The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

While petitioner alleges that the reason for his writ is Supreme Court Rule 17.1(c), charging a conflict between the lower court's decision herein with other applicable decisions of the Supreme Court (page 6 of his writ), he never shows or even argues where the lower court(s) deviated from the applicable standards enunciated by this Court in the cases petitioner cites to purportedly support his position, specifically, Stump v. Sparkman (1978) 453 U.S. 349, 98 S.Ct. 1099, 55

L.Ed.2d 331, Bradley v. Fisher (1872) 13 Wall. 335, 20 L.Ed. 646, Sniadach v. Family Finance Corp. (1969) 359 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, and Lugar v. Edmondson Oil Co., Inc. (1982) 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482.

In fact, petitioner misstates the Question for Review (page 1 of the Petition for Writ) in that the lower court(s) immaculately followed the law of Stump, et al., and further concluded that, while applying the law of Stump, petitioner had failed to show that the Honorable Judge MAURICE JOURDANE acted when there was a "clear absence of jurisdiction". To quote the Honorable William A. Ingram, Judge of the U.S. District Court, Northern District of California, on page 5 of his order:

> "The court finds that the Superior Court jurisdiction was not 'clearly absent' and hence no claim can be stated against this defendant [Judge Maurice Jourdane]."

To quote the United States Court of Appeals for the Ninth Circuit in its Order and Amended Opinion, after noting their review was "de novo", at page 7748 thereof:

> "Even assuming Judge Jourdane's assumption of jurisdiction was 'in excess of his jurisdiction' the act was not done 'in the clear absence of jurisdiction.'"

Both courts took note of the fact that Judge JOURDANE concluded that "his court retained jurisdiction because the order appealed from was for the payment of money", evidenced by his order to petitioner Robert M. Schucker to post "an under-

taking for alleged arrearages in such payments" pursuant to CCP §917.1(a), which reads:

> "The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for money or directs the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action, unless an undertaking is given."

Petitioner, as to his second "question", would have this Court believe that the decisions of the U.S. District Court and the U.S. Court of Appeals are in conflict with Sniadach v. Family Finance Corp. (1969), supra, and its progeny, especially Lugar v. Edmondson Oil Co., Inc. (1982), supra. While this issue is more addressed to the lawyer defendants, it should be noted that petitioner again works diligently here to misconstrue the prior findings to avoid the fact that both courts specifically followed the law of the land. The U.S. Court of Appeals in fact reviewed and followed Lugar where it states at page 7750 of its opinion:

> "Invoking state legal procedure does not constitute 'joint participation' or 'conspiracy' with state officials sufficient to satisfy section 1983's state action requirement. See Lugar v. Edmondson Oil Co. 457 U.S. 922, 939, n. 21 (1982)."

Contrary to petitioner's flailing allegations, neither lower court relied upon Aldabe v. Aldabe (1980) 616 F.2d 1089, to "find that being on the winning side of a lawsuit does not make an attorney a 'state actor' for the purposes of the Fourteenth Amendment."

While perhaps an initial review of this matter would make it appear that petitioner herein believes in his cause, the most telling action that discloses that conclusion is erroneous was petitioner's very own motion in the Monterey County Superior Court dissolution action filed July 27, 1983 (still during the pendency of his former wife's appeal) to set aside the interlocutory and final judgments of dissolution as to distribution of community property assets, invoking by necessary inclusion jurisdiction over his military retirement pay. Further, when that motion was denied, petitioner herein appealed to the California Court of Appeal. That appeal was rejected by written opinion dated May 23, 1984. In other words, Mr. Schucker, by his own actions, showed that even he believed there was jurisdiction to act. He was right, as the Court of Appeal upheld the order of Judge JOURDANE.

Petitioner intentionally fails in his statement of the case to properly advise this Court that:

(1) he had taken a writ of prohibition on Judge JOURDANE's ruling, which was denied,

(2) he himself brought a motion pertaining to the distribution of the community during the pendency of the wife's appeal,

(3) the California Court of Appeal affirmed Judge JOURDANE's order and overturned the November 27, 1981, ruling of Judge Drummond,

(4) pursuant to CCP §917(a), Judge JOURDANE offered to allow a stay upon an appropriate undertaking, which petitioner rejected, and

(5) both the United States District Court and the United States Court of Appeal specifically followed the cases that petitioner now alleges those Opinions are in conflict with.

What petitioner looks for with his current petition is solely another chance at the golden ring, in flagrant disregard of the required honesty and accuracy required under Supreme Court Rule 21.5.

REQUEST FOR SANCTIONS

The truth in fact is that the California trial court gave petitioner every opportunity to be heard on all issues, the opportunity for a stay on the filing of an undertaking to protect all parties' interests so the appeal could be perfected, a stay of imposition of sentence until after the appeal, then an opportunity to purge the contempt, and finally, even a reduction of the sentence to five days for his failure to pay $13,278.88 in compliance with a final judgment, which was beyond the appeal period. His reaction was to file the District Court action and subsequent appeal.

While this respondent clearly understands and will not dispute the U.S. Court of Appeals' decision in not giving attorney's fees pursuant to 42 U.S.C. §1988, Federal Rule of Appellate Procedure 38, and Federal Rule of Civil Procedure 11

through the date of its opinion, petitioner herein again acts to invoke the perogative of this Court to impose sanctions, including award of attorney's fees and costs on appeal, pursuant to Federal Rule of Civil Procedure 11 which states in pertinent part:

> "A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address....The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

At this point in time, petitioner herein has intentionally misstated the applicable questions, omitted critical elements of fact as enumerated, and misconstrued the findings of both the U.S. District Court and the U.S. Court of Appeals, Ninth Circuit, in violation of Supreme Court Rule 21.5 and Federal Rule of Civil Procedure 11. Only harassment can be envisioned in petitioner's current action, which should not go unchecked. Therefore, this respondent requests the imposition of attorney's fees and costs in conformity with the declaration of STEPHEN A. LANKES, included in the Appendix hereto, Item No. 3.

CONCLUSION

A chronological review of the various appearances, hearings, and appeals is specifically found in petitioner's complaint filed in the U.S. District Court, Northern District of California, as capsulated in the Statement of the Case herein as well as, to an extent, in the opinions rendered in the lower courts (attached hereto in the Appendix). They show that petitioner raised an issue of jurisdiction in the California trial court to preclude the enforcement of a 6 year old final judgment, of which he had notice, and therefore, upon which the time to appeal had run. The trial court (Judge MAURICE JOURDANE) decided he did have jurisdiction after briefing and argument of that issue. Petitioner then tried for a review by a writ of prohibition to the California Appellate Court. When that failed, petitioner filed a motion (thereby affirmatively invoking jurisdiction of the Superior Court of California) to set aside the judgment for distribution of community property. When that failed, he appealed the entire issue. When that failed, he refused compliance with the trial court order which offered him a suspension of sentence for doing little more than making payments

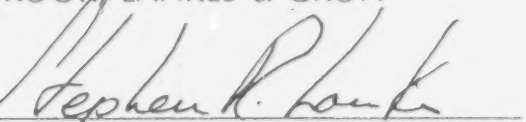
on the $13,278.88 he had withheld from the then 7 year old final judgment.

Because petitioner was unhappy with the outcome, he filed a complaint against his former wife's lawyers and the judge who decided against him. WHILE APPLYING ALL APPLICABLE LAW, the U.S. District Court found a failure in the existence of any actionable conduct on the part of any defendant. Petitioner then appealed and received a review de novo by the U.S. Court of Appeals. That court, AGAIN APPLYING ALL APPLICABLE LAW, found no actionable conduct on the part of any defendant. This petition for writ of certiorari ensued, erroneously alleging under Supreme Court Rule 17.1(c) a conflict with prior decisions of this Court, which petitioner knows is not the case.

Therefore, the Petition for Writ of Certiorari should be denied, and sanctions should be imposed against petitioner as prayed.

Date: October 7, 1988

HOLBROOK, LANKES & GROFF

By 

STEPHEN A. LANKES
Attorneys for Respondent
MAURICE JOURDANE

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. SCHUCKER,
Plaintiff-Appellant,

v.

TERRY G. ROCKWOOD; JAMES C. FUKUHARA; DEWAR, ROMIG & ROCKWOOD, INC.; ANNE D. McGOWAN; DeLAY, LAREDO & McGOWAN; MAURICE JOURDANE,
Defendants-Appellees.

No. 86-2900
D.C. No. CV-86-20009-WAI
ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding

Submitted March 24, 1988*

Filed May 17, 1988
Amended June 29, 1988

Before: J. Clifford Wallace, Joseph T. Sneed and Cecil F. Poole, Circuit Judges.

Per Curiam

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a)

SUMMARY

Judges/Civil Rights

Appeal from dismissal of 42 U.S.C. § 1983 action. The court affirmed holding that conclusory allegations that trial judge conspired with law firms are insufficient to support a section 1983 claim.

Schucker appeals pro se the district court's dismissal of his 42 U.S.C. § 1983 action. Schucker alleged that he had been deprived his liberty and property without due process of law.

[1] A judge loses absolute immunity only when he acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature. [2] At most, Schucker alleges that Judge Jourdane misinterpreted a statute and erroneously exercised jurisdiction. Even assuming this, the act was not done "in the clear absence of jurisdiction." [3] Schucker next argued, in essence, that in accepting the law firms' jurisdiction argument, in ordering him to make payments to his ex-wife, in allowing the law firms to serve an order to show cause regarding contempt arising from his failure to make the payments, and in ordering Schucker jailed for refusing to make payments, Judge Jourdane became part of a conspiracy to deprive him of his liberty and property. [4] Merely resorting to the courts and being on the winning side of a lawsuit does not make a private party a joint actor with the judge. Schucker's conclusory allegations that the judge conspired with the law firms are insufficient to support his section 1983 claim.

COUNSEL

Robert M. Schucker, pro se, Riverside, California, for the plaintiff-appellant.

Carmela M. Bowns, De Lay & Laredo, Pacific Grove, California; Don Roberson, Dewar, Romig & Rockwood, Inc., Monterey, California; Stephen A. Lankes, Holbrook, Lankes & Groff, Salinas, California, for the defendants-appellees.

ORDER

The opinion filed on May 17, 1988, is amended as follows:

On page 7750, first full paragraph, line 3, the following is inserted between "Appeal" and "reversed": ", among other things,".

On page 7750, first full paragraph, lines 6-8, the language after the word "distribution" to the end of the sentence is deleted.

With the above changes, appellant's petition for rehearing is denied.

OPINION

PER CURIAM:

Schucker appeals pro se the district court's dismissal of his 42 U.S.C. § 1983 action. Schucker alleged that he had been deprived his liberty and property without due process of law. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

We review a dismissal of an action de novo. *Whittington v. Whittington*, 733 F.2d 620, 621 (9th Cir. 1984). Dismissal of a pro se complaint without leave to amend is proper only if it is " 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.' " *Noll v. Carlson*, 809

F.2d 1446, 1448 (9th Cir. 1987), *quoting Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (per curiam). Schucker does not contend that the district court should have allowed him to amend his complaint nor does he suggest what amendment he would make had he been allowed to do so.

The district court dismissed Schucker's claim against Judge Jourdane on the ground that the judge was absolutely immune from civil liability. Schucker now argues that Judge Jourdane acted in the "clear absence" of jurisdiction because a notice of appeal had been filed in the California Court of Appeal arising from the community property dispute and therefore Judge Jourdane lost his judicial immunity.

[1] Judges are absolutely immune from damages actions for judicial acts taken within the jurisdiction of their courts. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc) (*Ashelman*). Grave procedural errors or acts in excess of judicial authority do not deprive a judge of this immunity. *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978) (*Stump*). A judge loses absolute immunity only when he acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature. *See Forrester v. White*, 108 S. Ct. 538, 544-46 (1988); *Stump*, 435 U.S. at 356-57 & n.7; *Ashelman*, 793 F.2d at 1075.

[2] At most, Schucker alleges that Judge Jourdane misinterpreted a statute and erroneously exercised jurisdiction and thereby acted in excess of his jurisdiction. Even assuming Judge Jourdane's assumption of jurisdiction was "in excess of his jurisdiction," the act was not done "in the clear absence of jurisdiction." *See Stump*, 435 U.S. at 357 n.7. Accordingly, the district court correctly dismissed Schucker's claim against Judge Jourdane.

The district court also dismissed Schucker's claim that Judge Jourdane and the law firms conspired to assert jurisdiction notwithstanding that jurisdiction allegedly only existed

in the California Court of Appeal due to the filing of a notice of appeal. Schucker made his jurisdictional argument in Judge Jourdane's court. Judge Jourdane concluded that, notwithstanding the filing of the notice of appeal from the superior court's denial of Mrs. Schucker's motion for a distribution of Schucker's military retirement pay as community property pursuant to the 1976 amended interlocutory judgment of dissolution of marriage, his court retained jurisdiction because the order appealed from was for the payment of money. After resolving the jurisdictional argument, Judge Jourdane found Schucker guilty of civil contempt of court for not complying with the distribution of the military retirement pay provisions of the 1976 amended interlocutory judgment. At the sentencing hearing on June 24, 1983, Judge Jourdane ordered Schucker to comply with the 1976 amended interlocutory judgment and to post "an undertaking for alleged arrearages in such payments."

[3] The basis of the alleged conspiracy was that approximately one month after Judge Jourdane issued this sentence, the law firms served an order to show cause why Schucker should not be held in contempt for failing to make required payments in accordance with the order. Schucker alleged that the law firms served the order in open court before Judge Jourdane. In essence, Schucker's complaint alleges that in accepting the law firms' jurisdictional argument, in ordering him to make payments to his ex-wife in accordance with the state divorce decree, in allowing the law firms to serve an order to show cause regarding contempt arising from his failure to make the payments, and in ordering Schucker jailed for refusing to make payments, Judge Jourdane became part of a conspiracy to deprive him of his liberty and property.

[4] The district judge dismissed this claim because he concluded that the mere invocation of state judicial process does not convert a private party's action into state action even if the plaintiff alleges a "conspiracy" between the private parties and the judge. Although we recognize that an individual may

state a section 1983 action against private parties that conspire with a state actor immune from civil liability, *see Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980) (allegations that private parties bribed a judge in order to obtain a favorable ruling), "merely resorting to the courts and being on the winning side of a lawsuit does not make a [private] party a joint actor with the judge." *Id.* at 28. Schucker's conclusory allegations that Judge Jourdane conspired with the law firms are insufficient to support his section 1983 claim. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (per curiam). Invoking state legal procedures does not constitute "joint participation" or "conspiracy" with state officials sufficient to satisfy section 1983's state action requirement. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 n.21 (1982).

Finally, Schucker argues that the district court improperly considered an unpublished California Court of Appeal opinion. In that opinion, the California Court of Appeal, among other things, reversed the denial of Mrs. Schucker's motion to compel Schucker to pay a portion of his military retirement pay to Mrs. Schucker as part of the community property distribution. Schucker contends that in considering this opinion the district court should have treated the defendants' motion to dismiss as a motion for summary judgment. *See* Fed. R. Civ. P. 12(b).

We disagree. The district court's order dismissing Schucker's complaint merely repeats the facts from the California opinion that Schucker alleged in his complaint. Thus, the California appellate court opinion, to the extent the district court referred to it, was part of the pleadings and the district court properly considered it in granting the motion to dismiss.

On appeal, the defendants request attorneys' fees under 42 U.S.C. § 1988, Fed. R. App. P. 38, and Fed. R. Civ. P. 11. We award attorneys' fees against an unsuccessful appellant only if the action is meritless, in the sense that it is groundless or frivolous. *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d

1361, 1367 (9th Cir. 1987) (per curiam) (discussing Fed. R. App. P. 38); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) (discussing Fed. R. Civ. P. 11); *Dooley v. Reiss*, 736 F.2d 1392, 1396 (9th Cir.) (discussing section 1988), *cert. denied*, 469 U.S. 1038 (1984). Because we do not believe that Schucker's appeal was groundless, we refuse to award attorneys' fees to the appellees. Schucker shall, however, bear the appellees' costs on appeal.

AFFIRMED.

REPRODUCTION OF COURT DOCUMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT M. SCHUCKER, Plaintiff, vs. TERRY G. ROCKWOOD, et al., Defendants.	)	No. C-86-2009-WAI O R D E R

The motions of all defendants to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) came on regularly for hearing on April 24, 1986. Upon consideration of the papers submitted and argument of counsel, IT IS HEREBY ORDERED THAT THE COMPLAINT BE DISMISSED WITHOUT LEAVE TO AMEND AS TO ALL DEFENDANTS. The request for sanctions pursuant to Fed. R. Civ. P. 11 IS HEREBY DENIED.

I. ALLEGATIONS OF COMPLAINT

This case arises out of a dissolution judgment and subsequent enforcement proceedings. A final dissolution of the Schucker marriage was entered in Monterey County Superior Court on or about July 1, 1977. Plaintiff has sued the trial court judge[1] that presided over orders to show cause (OSCs) re: contempt following the dissolution. Plaintiff has also named the two (2) law firms[2] that represented Ms. Schucker in the dissolution and subsequent enforcement proceedings. Plaintiff alleges that

Judge Jourdane and the law firms deprived him of his civil rights in violation of 42 U.S.C. §1983. The gist of the complaint is that Jude Jourdane and the law firms conspired to assert improper Superior Court jurisdiction over the various enforcement proceedings following the dissolution.

The procedural history of the case, as alleged in plaintiff's thirty-three (33) page complaint, is complex. Sometime in 1981, plaintiff stopped paying his ex-spouse any part of his Navy retirement pay. Plaintiff based this decision on McCarty v. McCarty, 453 U.S. 210 (1981)[3]. Ms. Schucker then brought a motion for distribution of her community property interest in the Navy pension. This motion was denied by Judge Drummond pursuant to a minute order entered November 27, 1981. Ms. Schucker appealed this order by notice filed January 6, 1982.

Two (2) motions were then brought by Ms. Schucker. A motion for increased child support was brought on January 14, 1986 and was subsequently granted by Judge Drummond. A writ of execution regarding the Navy pension was obtained pursuant to a March 25, 1983 order by Judge Farrel. (The Navy did not allow the pension to be garnished.)

Judge Jourdane's first involvement in the case is in May 1983. Plaintiff appeared before Judge Jourdane on May 6, 1983 in response to an OSC re: contempt for non-payment of monies owed to Ms. Schucker. Judge Jourdane was allegedly enforcing a 1977 interlocutory judgment of dissolution which required payment of the Navy pension to Ms. Schucker. Plaintiff was held in contempt of court by order dated June 2, 1983. Plaintiff's writ of prohibition was denied.

Judge Jourdane next presided over various OSC hearings and related matters. Plaintiff moved to set aside the 1977 final judgment of dissolution on the grounds of extrinsic fraud.

The motion was denied by Judge Jourdane pursuant to a August 30, 1983 minute order. Plaintiff appealed this order. The appeal was consolidated with the pending appeal of the November 1981 Judge Drummond minute order.

The California appellate court, in an opinion dated May 23, 1984, (A015208), ruled against plaintiff on both appeals. The November 1981 minute order by Judge Drummond was reversed. The August 1983 minute order by Judge Jourdane was affirmed. The Appellate Court assessed sanctions against plaintiff for a frivolous appeal.

A bench warrant was issued by Judge Jourdane on December 28, 1984 for plaintiff's arrest. Plaintiff was incarcerated at Monterey County Jail from December 28, 1984 through December 31, 1984.

The gravaman of the complaint is that Judge Jourdane joined a conspiracy which existed between the two (2) law firms. Specifically, ¶22 of the complaint alleges that the law firms:

> "[C]onspired...to continue to seek Superior Court exercise of jurisdiction over the matters on appeal during the pendency of the appeal, and to seek to further deprive the plaintiff of more of his property under color of law, in further deprivation of the plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States."

¶36 of the complaint alleges that Judge Jourdane joined the conspiracy by allowing the Dewar attorney (Fukuhara) to serve plaintiff with an order to show cause regarding contempt of court for non-payment of monies owed to Ms. Schucker. The order was allegedly served in open court before Judge Jourdane.

Along with the above-mentioned conspiracy, the law firms allegedly violated plaintiff's civil rights by seeking contempt orders for his non-payment of monies owed to Ms. Schucker. In example, ¶32 alleges that the law firms sought an OSC re: contempt before payment was even due. ¶41 alleges that the law firms held an improper ex parte hearing with Judge Silver.[4]

II. JUDICIAL IMMUNITY

A judge is entitled to absolute immunity for judicial acts, "even where such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly [fn. omitted]. Stump v. Sparkman, 435 U.S. 349, 355-56 (1978), quoting Bradley v. Fisher, 13 Wall 335, 351, 20 L. Ed. 646 (1872). A judge loses this immunity "only when he has acted in the "clear absence of all jurisdiction." Stump, 435 U.S. 356-57, quoting Bradley, 13 Wall 351, 20 L. Ed. 646.

The initial issue is whether the Superior Court has jurisdiction over the Schucker divorce proceedings following the January 6, 1982, appeal. Unless such jurisdiction is "clearly absent", Judge Jourdane is absolutely immune from civil liability flowing from his judicial acts. Stump, 435 U.S. 356-57. The court finds that the Superior Court jurisdiction was not "clearly absent" and hence no claim can be stated against this defendant.

Accepting as true the allegations of the complaint, Judge Jourdane usurped the jurisdiction of the appellate court by requiring Plaintiff to comply with the 1976 amended interlocutory judgment regarding the Navy pension. That judgment has never been appealed. While this court expresses no opinion as to whether Judge Jourdane properly asserted jurisdiction during the pendency of the appeal, this court finds that such jurisdiction was not so "clearly absent" so as to negate the judicial immunity. Stump, 435 U.S. 356-57.

Plaintiff argues that his case falls within the rule of Ashelman v. Pope, 769 F.2d 1360 (9th Cir. 1985). In Ashelman, the pro se defendant in a criminal action brought a §1983 suit. The complaint specifically alleged extra-judicial agreements between the District Attorney and the judge. The judge and the District Attorney allegedly agreed to deprive the pro se defendant access to the law library and otherwise make the presentation of his defense difficult. The Ninth Circuit found that these alleged prior agreements were not "judicial acts" and hence the judicial immunity would not protect the judge from civil liability. 769 F.2d 1361-62.

Here, plaintiff makes no allegations of such extra-judicial agreements involving Judge Jourdane. Nor does it appear from the record before this court that the complaint could be so amended. See Aldabe, 616 F.2d 1089 (trial court dismissal of §1983 action against judge and law firms affirmed where allegations of conspiracy were conclusory); see also Dahlberg v. Becker, 748 F.2d 85 (2nd Cir. 1984) (trial court dismissal of §1983 action against judge and law firms affirmed where complaint was devoid of "meeting of the minds" or "intent to conspire" allegations.) The court finds the Aldabe and Dahlberg cases on point. Accordingly, the complaint against Judge Jourdane is dismissed without leave to amend.

III. LIABILITY OF LAW FIRMS

In Section II, supra, the allegations of a conspiracy between Judge Jourdane and the law firms were examined to determine if a "non-judicial" act had been pled so as to make the judicial immunity applicable. In reaching the conclusion that no such "non-judicial act" had been pled, the court necessarily found the allegations of a conspiracy between Judge Jourdane and the law firms insufficient.[5] Because no sufficient allegations of a conspiracy involving a "state actor" have been made, the §1983 action against the "non-state actor" law firms

must necessarily fail. See Aldabe, 616 F.2d 1089; see also Dahlberg, 748 F.2d 85. Accordingly, the claims against these defendants are dismissed without leave to amend.

Plaintiff's §1983 claim is premised on the allegation that Judge Jourdane and the law firms conspired to assert jurisdiction where such jurisdiction rested only with the appellate court. Were such allegations sufficient to state a §1983 claim, then any party believing jurisdiction was improper would have such a claim against opposing counsel. All improper jurisdictional rulings by a trial judge would give rise to a §1983 claim against that judge and the opposing counsel who argued that jurisdiction existed. This court declines to reach such a result.

In conclusion, the court finds the following observation by the Ninth Circuit in Aldabe appropriate:

> [Plaintiff's] dissatisfaction with the property settlement reached in the prior divorce proceedings, and her conclusory allegations...[of conspriacy]...are insufficient to a §1983 claim."

616 F.2d 1092. Mr. Schucker has unsuccessfully sought to have the 1977 dissolution set aside by the trial court. His subsequent appeal of that decision was found to be frivolous by the appellate court. As in Aldabe, Mr. Schucker's continued dissatisfaction with those dissolution proceedings simply does not rise to the level of a civil rights violation.

IV. SANCTIONS

The Dewar law firm has requested an award of sanctions pursuant to Fed. R. Civ. P. 11. This case presents a close issue as to whether such sanctions are appropriate. The Court, in its discretion, declines to award such sanctions.

V. CONCLUSION

Based on the foregoing, the complaint is DISMISSED WITHOUT LEAVE TO AMEND AS TO ALL DEFENDANTS.[6] The request for sanctions is DENIED.

DATED: 6 26 86

/S/ WILLIAM A. INGRAM
WILLIAM A. INGRAM
United States District Judge

FOOTNOTES

[1]Judge Jourdane was a Superior Court judge in Monterey County at all relevant times herein.

[2]The DeLay law firm initially represented Ms. Schucker. The Dewar law firm was substituted in as counsel of record on or about October 11, 1983. Ms. McGowan, an attorney with the DeLay law firm, is named as an individual defendant. Mr. Rockwood and Mr. Fukurha, attorneys with the Dewar law firm, are also named as individual defendants. The above-mentioned defendants are hereinafter collectively referred to as the "law firm defendants."

[3]The Uniformed Services Former Spouses Protection Act, 10 U.S.C. §1408, was enacted to preclude subsequent applications of McCarty. In Re Marriage of Buikema, (1983) 139 Cal. App. 3d 689, 691.

[4]Judge Silver is not named as a defendant in the complaint. Judges Drummond and Farrel are also not named in the complaint. These judges, like Judge Jourdane, exercised jurisdiction over the Schucker dissolution while the January 6, 1982 appeal was pending.

[5]The court recognizes that a §1983 action may still be stated against private parties that conspire with a state actor immune from civil liability. See Dennis v. Sparks, 449 U.S. 24 (1980) (Section 1983 action stated against attorneys who allegedly bribed trial judge to issue preliminary injunction, even though judge was immune from §1983 civil liability.) Dennis, unlike the instant case, involved specific allegations of a conspiracy between the judge and counsel.

[6]The court's dismissal of the complaint for failure to state a conspiracy claim against Judge Jourdane makes it unnecessary

to consider the other arguments advanced by the parties. The court, however, does refer the parties to Bynum v. City of Berkeley, 622 F. Supp 196 (N.D. Cal 1985). In Bynum, Judge Patel expressly held that the one year statute of limitations recognized in Wilson v. Garcia, — U.S. — , 105 S. Ct. 1938 (1985), should not be applied retroactively so as to time bar §1983 suits. This court has also so ruled in an unpublished order. See Montanez v. City of Salinas et al., No. C-85-20061-WAI, filed August 1, 1985.

REPRODUCTION OF COURT DOCUMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT M. SCHUCKER, Plaintiff, vs. TERRY G. ROCKWOOD, et al., Defendants.	)	No. C-86-20009-WAI JUDGMENT

In accordance with the accompanying Order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-entitled action is DISMISSED.

DATED: JUN 26 1986

/S/ WILLIAM A. INGRAM
WILLIAM A. INGRAM
United States District Judge

DECLARATION OF STEPHEN A. LANKES IN SUPPORT OF REQUEST FOR SANCTIONS AND ATTORNEYS' FEES AND COSTS

I, STEPHEN A. LANKES, Declare:

I am an attorney at law duly licensed to practice before all the courts of the State of California, the U.S. District Court for the Northern District of California, the U.S. Court of Appeals, Ninth Circuit, and the U.S. Supreme Court. I am a member of the firm of HOLBROOK, LANKES & GROFF, attorneys of record for respondent MAURICE JOURDANE herein.

I was retained by the County of Monterey to defend MAURICE JOURDANE in the suit brought by petitioner Robert M. Schucker. My hourly rate for legal services rendered to the County of Monterey is $80.00 per hour. I have expended the following time and incurred the following charges on behalf of defendant MAURICE JOURDANE on petitioner's petition for writ of certiorari to the U.S. Supreme Court, to wit:

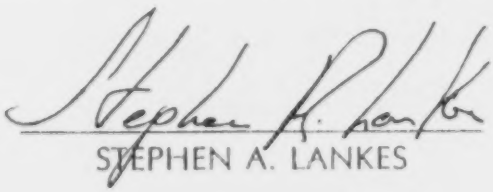
Date of Service	Service Rendered	Time	Fee
9-26-88	Receive and review plaintiff's petition for writ of certiorari to U.S. Supreme Court; research response needs to same; telephone conference with County Counsel re same	1.0	80.00
9-27-88	Commence research on brief in opposition to petition for writ of certiorari	4.8	384.00

9-28-88	Completion of research and preparation of brief in opposition to petition for writ of certiorari	6.6	528.00
9-29-88	Review final draft of opposition brief; office conference with printer for required brief in compliance with Supreme Court Rule 33; status report to client	1.1	88.00
	Total Fees		$ 1,080.00

Pursuant to the petition for attorney's fees made in the body of the opposing brief herein, it is hereby respectfully requested that this Court order petitioner Robert M. Schucker to pay to respondent MAURICE JOURDANE's attorneys the sum of One Thousand Eighty Dollars ($1,080.00)

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of October, 1988, at Salinas, California.



STEPHEN A. LANKES